Supreme Court, U.S.
FILED
JUL 3 1991
OFFICE OF THE CLERK

No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

SCOTT M. ANDERSON
SBT #01214500
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-9156

Attorney For Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	4

TABLE OF AUTHORITIES

Page

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) 4

Brown v. Ohio, 97 S.Ct. 2221, 2225 (1977) 3, 4

Dowling v. U.S., 110 S.Ct. 668 (1990) 3

Grady v. Corbin, 110 S.Ct. 2084 (1990) 1, 2, 3

Green v. U.S., 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) 4

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) 3, 4

U.S. v. Anderson, 906 F.2d 1485 (10th Cir. 1990) 4

U.S. v. Calderone, 917 F.2d 717 (2nd Cir. 1990) 3

U.S. v. Felix, 926 F.2d 1522, 1529 (10th Cir. 1991) 867 F.2d 1068, 1070-71 (8th Cir. 1991) 2, 3

U.S. v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) 4

U.S. v. Martin Linen Supply Co., 430 U.S. 5674, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) 4

Fifth Amendment to the United States Constitution – Throughout Section 841(a)(1) of Title 21 U.S.C.A. 1, 3

No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The decision below was in accordance with the Fifth Amendment to the United States Constitution and the teaching of *Grady v. Corbin*, 110 S.Ct. 2084 (1990).

ARGUMENT

Grady v. Corbin, 110 S.Ct. 2084 (1990), set forth clearly for the first time the proposition that the Fifth Amendment to the United States Constitution "bars any subsequent prosecution in which the government, to establish an essential element of an offense charge in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2093.

The Government admits, in its Petition for Certiorari, that the identical evidence was used to produce convictions in two separate jury trials in two separate *federal* jurisdictions for the same conduct. Petition for Certiorari, pages 2 through 9 entitled "Statement". By a plain reading of the opinions in the two "Felix Trials", it is plain that (1) the conduct presented at both trials is identical, (*United States v. Felix*, 926 F.2d 1522, 1529 (10th Cir. 1991), [citing *United States v. Felix*, 867 F.2d 1068, 1070-71 (8th Cir. 1989)]; (2) no *new evidence* was developed between the trials or presented at the second trial; (3) the *conduct* presented in the first trial to support the *essential element of intent and 'substantial step' requirements for conviction* was used in the second trial to prove *substantive offenses*, indicted in Oklahoma as Counts 1 through 6, (*U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (4) the government admitted at trial that the "Possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17, and 18 in the present indictment, (Oklahoma) (Felix II), was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri", and should not be permitted to argue to the contrary in this high Court. *U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (5) the offenses of *conspiracy and attempt* to violate Section 841(a)(1) of Title 21 U.S.C.A., are identical, and subject to identical proof.

The guarantee of the Fifth Amendment (Double Jeopardy Clause) protects against "a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); *Brown v. Ohio*, 97 S.Ct. 2221, 2225 (1977).

The Government's Petition for Certiorari in this case mistakenly focuses on the dissent by Judge Anderson, and on the case of *Dowling v. United States*, 110 S.Ct. 668 (1990), decided before *Grady v. Corbin*, and dealing with Rule 404(b) evidence. In *Dowling*, evidence of an identification in an unrelated robbery was allowed, even though the defendant had been acquitted, where *"the prior acquittal did not determine an ultimate issue in the present case." Dowling v. U.S.*, 110 S.Ct. 668, 672 (1990).

The case of *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990), denigrated in the government's petition for certiorari at pp. 6 and 14, is directly on point in this case, and correctly decided. There, the government carved a smaller conspiracy out of a larger conspiracy for which the defendant was acquitted. Here, the government charged in Oklahoma a larger conspiracy out of facts proved in Missouri to support the intent requirement and substantial step requirement of a prosecution for attempt.

"Where successive prosecutions are at stake, the guarantee (of the Fifth Amendment Double Jeopardy Clause) serves 'a constitutional policy of finality for the defendant's benefit.' *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 5674, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), and from attempts after a prior conviction and sentence, see *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); cf. *North Carolina v. Pearce, supra.*"

Brown v. Ohio, 97 S.Ct. 2221, 2225 (1977).

As an aside to this multiple prosecution, the undersigned attorney was jailed for contempt in his attempt to prevent yet a *third prosecution* of his client. In 1989, the U.S. attorney sought to compel information from the attorneys concerning *fees received in defending Felix and his co-defendants*, with the intention of prosecution Felix under the CCE statute in the *Northern District of Oklahoma*. See *U.S. v. Anderson*, 906 F.2d 1485 (10th Cir. 1990).

CONCLUSION

The Constitution of the United States protects the citizens from government, and does not constitute legislation enabling the reduction of the liberties set forth therein. No possible interpretation of the double jeopardy

clause of the Fifth Amendment will permit these successive prosecutions. Therefore, the Petition of the Government for Certiorari should be denied.

Respectfully submitted,

Scott M. Anderson
SBT #01214500
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-9156

Attorney For Respondent